RECORD AND BRIEFS

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No.

In the Supreme Court of the United States

GREG ABBOTT, ET AL, APPELLANTS,

v.

SHANNON PEREZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the district court issued an appealable interlocutory injunction when it invalidated Texas' duly enacted redistricting plan and ordered the parties to appear at a remedial hearing to redraw Texas House of Representatives districts unless the Governor called a special legislative session to redraw the Texas House map within three business days.

2. Whether the Texas Legislature acted with an unlawful purpose when it enacted Texas House of Representatives districts originally imposed by the district court to remedy any potential constitutional and statutory defects in a prior legislative plan that was repealed without ever having taken effect.

3. Whether any of the invalidated districts that were unchanged from the 2012 court-imposed remedial plan to the 2013 legislatively adopted plan (in Bell, Dallas, and Nueces Counties) are unlawful, where the district court in 2012 issued an opinion explaining why these districts were lawful.

4. Whether the Texas Legislature had a strong basis in evidence to believe that consideration of race to maintain a Hispanic voter-registration majority was necessary in HD90 in Tarrant County, where one of the plaintiffs in the lawsuit told the Legislature it had to keep the district's population above 50% Spanish-surnamed voter registration to avoid diluting Hispanic voting strength.

PARTIES TO THE PROCEEDING

Plaintiffs in the district court are Shannon Perez, Gregory Tamez, Nancy Hall, Dorothy DeBose, Carmen Rodriguez, Sergio Salinas, Rudolfo Ortiz, Lyman King, Armando Cortez, Socorro Ramos, Gregorio Benito Palomino, Florinda Chavez, Cynthia Valadez, Cesar Eduardo Yevenes, Sergio Coronado, Gilberto Torres, Renato De Los Santos, Jamaal R. Smith, Debbie Allen, Sandra Puente, Kathleen Maria Shaw, TJ Carson, Jessica Farrar, Richard Nguyen Le, Wanda F. Roberts, Mary K. Brown, Dottie Jones, Mexican American Legislative Caucus - Texas House of Representatives (MALC), Texas Latino Redistricting Task Force, Joey Cardenas, Alex Jimenez, Emelda Menendez, Tomacita Olivares, Jose Olivares, Alejandro Ortiz, Rebecca Ortiz, Margarita V Que da, Romeo Munoz, Marc Veasey, Jane Hamilton, John Jenkins, Eddie Rodriguez, City of Austin, Constable Bruce Elfant, Travis County, David Gonzalez, Milton Gerard Washington, Alex Serna, Sandra Serna, Betty F. Lopez, Beatrice Saloma, Joey Martinez, Lionor Sorola-Pohlman, Balakumar Pandian, Nina Jo Baker, Juanita Valdez-Cox, Eliza Alvarado, the League of United Latin American Citizens (LULAC), Henry Cuellar, Texas State Conference of NAACP Branches, Howard Jefferson, Bill Lawson, Eddie Bernice Johnson, Sheila Jackson-Lee, Alexander Green, United States of America, Rod Ponton, Pete Gallego, Filemon Vela, Jr., Gabriel Y. Rosales, Belen Robles, Ray Velarde, Johnny Villastrigo, Bertha Urteaga, Baldomero Garza, Marcelo H. Tafoya, Raul Villaronga, Asenet T. Armadillo, Elvira Rios, Patricia Mancha, and Juan Ivett Wallace.

Defendants in the district court are Greg Abbott, in his official capacity as Governor of Texas, Rolando Pablos, in his official capacity as Texas Secretary of State, the State of Texas, Steve Munisteri, in his official capacity as Chair of the Texas Republican Party, Boyd Richie, Gilberto Hinojosa, in his official capacity as Chair of the Texas Democratic Party, and Sarah M. Davis.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

Five years ago, this Court ordered the three-judge district court in this case "to draw interim maps" for the State of Texas' 2012 elections "that do not violate the Constitution or the Voting Rights Act." *Perry v. Perez*, 565 U.S. 388, 396 (2012) (per curiam). The district court followed this Court's command when it formulated remedial maps and ordered the State to conduct its 2012 elections to the Texas House of Representatives under a court-ordered remedial plan known as Plan H309. As the district court explained in a detailed opinion in 2012, Plan H309 addressed all of the statutory or constitutional deficiencies that had been identified in the Texas Legislature's initial 2011 map.

While Texas could have continued to pursue the litigation necessary to employ its duly enacted 2011 map in subsequent elections, the State opted for a more conciliatory approach in an attempt to end this litigation: it accepted the district court's decision and adopted the

court-ordered remedial plan as its own, making only minor changes to a handful of districts. In 2013, the Texas Legislature repealed the 2011 Texas House plan and enacted a new plan, Plan H358, which incorporated all but a few districts unchanged from the court-ordered Plan H309. The 2011 plan therefore never took legal effect: it was formally repealed before it was ever used to conduct a single election. Subsequent elections were held under a remedial map first imposed by the court and then adopted with only slight modifications by the Legislature.

The plaintiffs amended their complaints to assert claims against the newly enacted Plan H358, but instead of moving on to pursue their claims against that plan—the only live plan for the Texas House of Representatives—the district court allowed the plaintiffs to continue pursuing their moot claims against the repealed 2011 Texas House plan. The district court spent nearly four years adjudicating claims against the defunct and never-employed 2011 plan, finally issuing a decision in April 2017. While the court was adjudicating claims against the long-dead 2011 plan, Texas held two more elections under Plan H358.

Now, five years and three election cycles after *ordering* Texas to use the map that later largely became Plan H358, the district court has held that the Legislature engaged in intentional discrimination when it adopted the court-imposed districts as its own. In fact, almost all of the districts where the court found violations were adopted *verbatim* from the court-imposed plan (in Bell, Dallas, and Nueces Counties).

The district court's finding of intentional racial discrimination in those districts relies on the same grievously flawed conception of intentional discrimination that pervades its order on the State's congressional plan: The district court held that, when adopting nearly every district in the 2012 court-imposed map as its own, "the Legislature in 2013 purposefully maintained the intentional discrimination in Plan H283"—the Texas House plan that was enacted in 2011 but never precleared, never in effect, never used to conduct a single election, and repealed in 2013.[1] J.S. App. 84a. In reality, the Legislature adopted Plan H358 to eliminate, not perpetuate, any potential defects in Plan H283—defects that, in all events, never existed in the first place.

The district court also plainly erred in finding a violation in one of the few districts (HD90) that the Legislature did change in 2013 from the court-imposed 2012 map. As to that district, the district court concluded—in direct conflict with this Court's precedents, *see, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017)—that "avoid[ing] a potential VRA problem" is just "a vague goal" that does not supply the requisite

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[1] *See* J.S. App. 6a ("This Court's analysis in the Order on Plan C235 concerning the intent of the 2013 Legislature applied to both Plan C235 and Plan H358."); *id.* at 84a-85a ("[V]iolations found by this Court in its Order on Plan H283 and not sufficiently altered in Plan H358 now require a remedy, including specifically in Bell County, Dallas County, Nueces County, and Tarrant County.").

"strong basis in evidence" to conclude "that the VRA required [the] use of race," J.S. App. 81a. That conclusion is neither legally nor factually sustainable.

The Legislature revised HD90 after the Mexican American Legislative Caucus (MALC), a plaintiff in this litigation, insisted that failure to do so would violate VRA §2. Yet despite the Legislature's attempt to maintain Hispanic voting strength in HD90, a different plaintiff *still* raised a claim of vote dilution—the same plaintiff who alleged racial gerrymandering. By sustaining that racial-gerrymandering claim even though the use of race was plainly designed to avoid a VRA §2 violation, the district court left the State with no breathing room to achieve compliance with both the Constitution and the VRA. More fundamentally, the district court's conclusion that changes made to HD90 at the behest of the plaintiffs in this litigation still could not "cleanse" the 2011 maps of their purported "taint" only underscores that, in the district court's profoundly misguided view, future Legislatures can *never* truly escape the charge of discriminatory intent that the court levied at the 2011 Legislature.

This Court has already stayed the district court's order pending appeal. *Abbott v. Perez*, No. 17A245, 2017 WL 4014810 (Sept. 12, 2017). The Court's plenary review is warranted to reverse the district court's novel constitutional-for-the-courts-but-not-for-the-Legislature theory and its prohibitive interpretation of strict scrutiny—both of which are plainly wrong, but at a minimum present substantial questions for this Court's review.

OPINION BELOW

Appellants appeal the three-judge district court's Order on Plan H358, *Perez v. Abbott*, No. 5:11-cv-360, 2017 WL 3668115 (W.D. Tex. Aug. 24, 2017), J.S. App. 3a-87a. That order incorporated the district court's prior findings and opinions on the 2011 map. *Id.* at 7a n.5.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1253. *See infra* Part I. Appellants filed their notice of appeal on August 28, 2017, J.S. App. 1a-2a. The Court has jurisdiction to consider claims regarding the currently operative Plan H358, but claims against the repealed 2011 map are moot.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Fourteenth Amendment and §2 of the Voting Rights Act (VRA), 52 U.S.C. §10301. The relevant provisions are reproduced in the appendix to this jurisdictional statement. *See* J.S. App. 437a-439a.

STATEMENT

A. In 2011, the Texas Legislature enacted reapportionment plans for Texas state legislative and congressional districts. Before the Legislature even enacted these redistricting plans, however, the plaintiffs filed this lawsuit raising claims against the State under the Constitution and VRA §2, and the Chief Judge of the Fifth Circuit constituted a three-judge district court under 28 U.S.C. §2284.

VRA §5 prevented the 2011 plans from taking legal effect until they were precleared. *See* 52 U.S.C. §10304. Texas filed suit in the United States District Court for the District of Columbia seeking preclearance. Unless and until preclearance was granted, claims against the 2011 plans under the Constitution and VRA §2 remained unripe, leaving the district court here without subject-matter jurisdiction to rule on the merits. The 2011 plans were never precleared.

B. While the preclearance lawsuit was pending, the Texas three-judge district court here conducted a two-week trial beginning on September 6, 2011, regarding the constitutional and VRA §2 claims against the 2011 maps. Because a final judgment in the preclearance litigation seemed unlikely to come in time for the 2012 election cycle, the district court ordered the parties to submit proposed interim plans for the 2012 elections.

In November 2011, by a 2-1 vote with Judge Smith dissenting, the district court ordered the 2012 Texas House elections to be conducted under a court-ordered plan (H302). Concluding that it "was not required to give any deference to the Legislature's enacted plan," the district court announced that it had drawn an "independent map" based on "neutral principles that advance the interest of the collective public good." *Perez*, 565 U.S. at 396.

Texas moved to stay that interim plan pending appeal. On December 9, 2011, this Court granted the State's motion to stay, noted probable jurisdiction, is-

sued an expedited briefing schedule, and set oral argument for January 9, 2012. *Perry v. Perez*, 565 U.S. 1090 (2011) (mem.).

On January 20, 2012, the Court vacated the district court's order in a unanimous opinion. *Perez*, 565 U.S. at 399. The Court held that "the District Court exceeded its mission to draw interim maps that do not violate the Constitution or the Voting Rights Act, and substituted its own concept of 'the collective public good' for the Texas Legislature's determination of which policies serve 'the interests of the citizens of Texas.'" *Id.* at 396.

This Court emphasized that the district court's mission was remedial, not a freewheeling mandate to pursue the collective good, and gave the court specific instructions—six separate times—to implement plans that complied with the Constitution and the VRA:

- "'[F]aced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying' a state plan—even one that was itself unenforceable—'to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.'" *Id.* at 393 (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997)).
- "[T]he state plan serves as a starting point for the district court. It provides important guidance that helps ensure that the district court appropriately confines itself to drawing interim maps that comply with the Constitution and the Voting Rights Act, without displacing legitimate state policy

judgments with the court's own preferences." *Id.* at 394.

- "A district court making such use of a State's plan must, of course, take care not to incorporate into the interim plan any legal defects in the state plan." *Id.* (citing *Abrams*, 521 U.S. at 85-86; *White v. Weiser*, 412 U.S. 783, 797 (1973)).
- "[A] district court should still be guided by [the State's] plan, except to the extent those legal challenges are shown to have a likelihood of success on the merits." *Id.*
- The district court should "take guidance from the lawful policies incorporated in such a[n unprecleared] plan." *Id.* at 395.
- The district court's "mission [is] to draw interim maps that do not violate the Constitution or the Voting Rights Act." *Id.* at 396.

C. On remand, the district court adopted and imposed Plan H309 as an interim remedial plan for the Texas House redistricting. J.S. App. 300a. The court explained that it followed this Court's "direction to leave undisturbed any district that is free from legal defect," J.S. App. 303a, and that Plan H309 "obeys the Supreme Court's directive by adhering to the State's enacted plan except in the discrete areas in which we have preliminarily found plausible legal defects under the standards of review the Court has announced." J.S. App. 313a. The district court noted that §5 objections based on discriminatory purpose were reviewed under "the low 'not insubstantial' standard." *Id.* Plan H309 reconfigured 28 of the

State's 150 House districts; 21 were "altered substantially."[2] But Plan H309 retained without change the House districts in Bell, Dallas, Nueces, and Tarrant Counties as configured in the 2011 plan.

D. After the D.C. district court denied preclearance to the 2011 plans, *see Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated*, 133 S. Ct. 2885 (2013) (mem.), the State appealed that ruling to this

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[2] In Plan H309, the district court reconfigured HD41 to address a claim that the Legislature violated the one-person, one-vote doctrine by overpopulating four heavily Democratic districts in Hidalgo County and underpopulating the fifth district in order to protect the Hispanic Republican incumbent, who had recently switched parties. J.S. App. 304a-305a. It reconfigured HD35, a largely rural district in South Texas, moving it to the Rio Grande Valley to address a "not insubstantial" claim of retrogression under VRA §5. *Id.* at 305a-306a. It reconfigured HD117, a district on the outskirts of San Antonio in Bexar County, to address a "not insubstantial" claim of intentional discrimination under VRA §5. *Id.* at 306a-307a. It reconfigured HD144 in eastern Harris County as a Hispanic opportunity district to address a claim of vote dilution under VRA §2. *Id.* at 309a-311a. It reconfigured HD149 in western Harris County to address a "not insubstantial" claim of retrogression under VRA §5. *Id.* at 311a-312a. And it reconfigured HD77 and HD78 in El Paso County to address a "not insubstantial" claim of intentional discrimination under VRA §5. *Id.* at 311a-312a. The district court expressly declined to reconfigure the House districts in Nueces County, which lost a House seat based on the 2010 Census, because it found that the plaintiffs were not likely to succeed on claims of vote dilution under VRA §2, and any retrogression caused by the loss of a seat had been offset by the creation of HD144 as a new Hispanic opportunity district. *Id.* at 308a-309a.

Court. The State's 2012 Texas House elections were conducted under the district-court-ordered Plan H309.

E. While the State's appeal in the preclearance case was pending, the Texas Attorney General encouraged the Legislature to adopt the district-court-ordered remedial Plan H309 as the State's permanent reapportionment plan. J.S. App. 440a-446a. On May 27, 2013, the Governor called the Legislature into a special session "[t]o consider legislation which ratifies and adopts the interim redistricting plans ordered by the federal district court as the permanent plans for districts used to elect members of the Texas House of Representatives, Texas Senate and United States House of Representatives." Proclamation by the Governor, No. 41-3324 (May 27, 2013).

Similar to the congressional Plan C235, in which the 2013 Legislature adopted the 2012 court-imposed plan verbatim, the vast majority of the districts (136 of 150) in the 2013 Legislature's map for the Texas House were identical to the court-ordered Plan H309. The remaining few districts made minor changes to the court-imposed plan.

The 2013 Legislature formally repealed the 2011 redistricting plans and adopted Plan H358 on June 24, 2013. The next day, this Court held that VRA §4(b)'s coverage formula was unconstitutional and could "no longer be used as a basis for subjecting jurisdictions to preclearance." *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013). A day later, the Texas Governor signed into law the bill adopting Plan H358.

F. After the Legislature repealed the 2011 plans, the State moved to dismiss the claims against those plans as moot. J.S. App. 323a. The district court summarily denied the motion without even awaiting a response from the plaintiffs. *Id.* at 324a. The district court then granted the plaintiffs leave to amend their complaints to assert claims against the plans enacted in 2013. But the court also allowed the plaintiffs to continue challenging the repealed 2011 plans, permitting the plaintiffs to amend their pending claims to seek preclearance bail-in under VRA §3—once again rejecting the State's argument that claims against the repealed 2011 plans were moot. *Id.* The district court also granted a motion to intervene by the United States, which challenged only the 2011 plans. *Id.* at 95a n.7. After extensive additional discovery, the district court held a second trial on claims against the repealed 2011 Texas House plan in July 2014. *Id.* at 327a.

G. More than two years later, on April 20, 2017, the district court held by a 2-1 vote that many of the claims against the repealed 2011 plan, H283, were not moot. J.S. App. 88a, 275a-276a. The majority then found that the plaintiffs proved their claims of intentional vote dilution under VRA §2 and the Fourteenth Amendment "in El Paso County (HD78), Bexar County (HD117), Nueces County (the elimination of HD33 and the configuration of HD32 and HD34), HD41 in [Hidalgo County], Harris County, western Dallas County (HD103, HD104, and HD105), Tarrant County (HD90, HD93), Bell County (HD54), and with regard to Plan H283 as a whole." *Id.* at 275a. The majority also found the State liable for racial gerrymandering in HD117 in Bexar County. *Id.* Finally,

the majority rejected claims that the statewide plan violated the one-person, one-vote principle under *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.) (per curiam), *aff'd*, 542 U.S. 947 (2004) (mem.), but it found county-level one-person, one-vote violations in Nueces County (HD32 and HD34), Hidalgo County (HD31, HD36, HD39, HD40, and HD41), and Bell and Lampasas Counties (HD54 and HD55). J.S. App. 276a.

Judge Smith dissented, both on jurisdictional grounds and on the merits. *Id.* at 277a-299a. On jurisdiction, he found that claims against the 2011 map were moot because the map had been repealed and was never in effect. *Id.* at 279a-280a. Judge Smith's reasoning on mootness already had been adopted by the Fifth Circuit in a related case involving the State's 2011 redistricting plan for the Texas Senate. *See Davis v. Abbott*, 781 F.3d 207, 220 (5th Cir.), *cert. denied*, 136 S. Ct. 534 (2015) (holding that Texas "repealed the 2011 plan and adopted the district court's interim plan in its place, thus mooting Plaintiffs' lawsuit" and depriving the district court of jurisdiction to vacate its preliminary injunction).

On the merits, Judge Smith concluded that "the majority commit[ted] grave error in its recitation of redistricting law," J.S. App. 278a, and that "the majority's factual findings [we]re so extreme as to defy logic and reason under this record," *id.* at 280a.[3]

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[3] Had the claims been live, Judge Smith would have concurred in the majority's conclusion, regarding one-person, one-vote claims, that "the State erred in assuming, without support in the law, that the ten-percent test offers an unassailable safe haven." J.S. App. 278a n.1 (Smith, J., dissenting).

H. Although the State had repeatedly told the district court that its electoral districts must be set by October 1, 2017, to avoid disruption of deadlines for the November 2018 elections, trial on the operative 2013 maps (*i.e.*, Plan H358) did not begin until July 2017. *Id.* at 327a.

On August 24, 2017, the district court issued a divided decision invalidating Plan H358. *Id.* at 3a-87a. Notwithstanding the fact that the court itself had ordered the State to use the largely indistinguishable Plan H309 five years earlier, and notwithstanding that this plan was adopted by the 2013 Legislature with a different purpose (resolving the ongoing dispute about the Texas House of Representatives districts by embracing the court's remedial plan as its own), the court concluded that the State engaged in intentional vote dilution. It reasoned that the Legislature engaged in intentional discrimination by preserving verbatim from the district court's remedial map HD54 and HD55 (in Bell County); HD32 and HD34 (in Nueces County); and HD103, HD104, and HD105 (in Dallas County). *Id.* at 84a-85a. And in Tarrant County, where the 2013 Legislature *did* redraw HD90 to address concerns raised by plaintiffs in this case, the court nonetheless found that the Legislature failed to remedy "intentional discrimination. . . affecting HD90 and HD93," and that it engaged in racial gerrymandering in redrawing HD90. *Id.* at 85a.

The court gave the Governor three business days to either order a special session of the Legislature or consult with experts, prepare remedial map proposals, and appear at a hearing on September 6, 2017, to redraw

Texas' House districts on an expedited basis. *Id.* at 86a-87a.

Texas filed a notice of appeal of the district court's order on Plan H358. *Id.* at 1a-2a. After the district court denied Texas' stay motion, Justice Alito, acting as Circuit Justice for the Fifth Circuit, entered a temporary stay and requested a response from the plaintiffs. *Abbott v. Perez*, No. 17A245, 2017 WL 3783708 (Aug. 31, 2017) (Alito, J., in chambers). This Court then granted a stay "pending the timely filing and disposition of an appeal to this court" on September 12, 2017. *Perez*, 2017 WL 4014810.

THE COURT SHOULD NOTE PROBABLE JURISDICTION OR SUMMARILY REVERSE

According to the district court, the Texas Legislature engaged in intentional discrimination by enacting into law Texas House districts identical to those the district court itself had ordered the State to use. That bears repeating: the court concluded that the Legislature engaged in *intentional* discrimination by enacting nearly all of *the court's own remedial map*. That remarkable decision defies law, logic, and fact. Even accepting the court's fundamentally flawed premise that a Legislature must "cleanse" past legislation of the "taint" of a previous Legislature's "discriminatory intent" before adopting it, the Legislature plainly did not act with unlawful purpose when it took the district court at its word that the court's own remedial map did indeed remedy the potential constitutional and VRA violations that the court identified. What was a valid remedy when embraced by

the three-judge court does not somehow become intentionally discriminatory when embraced by the State Legislature.

Nor is there any racial gerrymandering violation in HD90, the single invalidated district that the 2013 Legislature changed from the 2012 court-imposed map. HD90 was revised to address a specific concern raised by the Mexican American Legislative Caucus—a plaintiff in this case—that failure to maintain the percentage of Spanish-surnamed registered voters in HD90 would result in vote dilution. The district court's conclusion that the Legislature's good-faith effort to address threatened VRA §2 claims did not justify the consideration of race cannot be reconciled with this Court's precedents, as it eliminates what little breathing room legislatures have left to draw districts that comply with the many competing demands that federal and state law impose.

I. This Court Has Jurisdiction to Review the District Court's Order.

This Court has jurisdiction to review the three-judge district court's order because it constitutes an interlocutory injunction, and federal law authorizes a direct appeal to this Court. 28 U.S.C. §1253. The Court has "no discretion to refuse adjudication of the case on its merits" when an appeal is properly brought under §1253. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014).

While the district court did not label its order an "injunction," this Court has made clear that appellate jurisdiction turns on the "practical effect" of the lower court's order, not its form or use of magic words. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981) (interpreting 28

U.S.C. §1292(a)). Interpreting *Carson*, lower courts have consistently held that "[e]ven if an order does not by its terms grant or deny a specific request for an injunction . . . the order may still be appealable if it has the 'practical effect' of doing so." *Salazar ex rel. Salazar v. Dist. of Columbia*, 671 F.3d 1258, 1261-62 (D.C. Cir. 2012); *see also, e.g.*, *Thomas ex rel. D.M.T. v. Sch. Bd. St. Martin Par.*, 756 F.3d 380, 384 (5th Cir. 2014); *Etuk v. Slattery*, 936 F.2d 1433, 1440 (2d Cir. 1991).

That is precisely the case here, as the district court's order has the "practical effect" of preventing the State from conducting elections under its duly enacted redistricting plan. The district court held, among other things, that the "violations found by this Court in its Order on Plan H283 [the repealed 2011 plan] and not sufficiently altered in Plan H358 *now require a remedy*, including specifically in Bell County, Dallas County, Nueces County, and Tarrant County." J.S. App. 84a-85a (emphasis added). The court further held that that if the Legislature does not redraw the districts, the district court will. *Id.* at 86a. Indeed, the district court gave the Governor a mere three business days to decide whether to call the Legislature into special session to draw new maps. *Id.* And in the event the Governor declined to accede to that demand (he declined), the court ordered the parties to consult with mapdrawing experts, confer on the possibility of agreeing to a remedial plan, and come prepared to offer proposed remedial plans at a hearing to redraw Texas' House of Representatives map on September 6, 2017. *Id.* at 86a-87a. Simply put, there can be no serious

dispute that the district court's order enjoins Texas from conducting future elections under Plan H358.

To be sure, the deadlines set by the district court have come and gone without a redrawn map, but that is only because this Court stayed the order. The district court undoubtedly would promptly reschedule the hearing to redraw the map were the stay lifted.[4] The order thus alters the status quo and disrupts the State's election procedures by forbidding Texas from using H358 in future elections.

The district court's claim that it "has not enjoined [Plan H358's] use for any upcoming elections," Order, *Perez v. Abbott*, No. 5:11-cv-360 (W.D. Tex. Aug. 28, 2017) (ordering the parties "to proceed with preparations for the remedial hearing as previously directed"), is no bar to this Court's jurisdiction. No matter how the district court labels its order, it is an injunction in substance. If the order were not intended to block the State from using Plan H358—and to do so immediately—there would have been no reason to put the Governor under a three business-day deadline or to order the parties to rush to redraw maps less than two weeks after declaring Texas House districts in four counties invalid. After all, this Court's precedent requires "afford[ing] a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather

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[4] In fact, after Justice Alito granted a temporary stay of the district court's order on the State's congressional plan, C235, the district court issued an "advisory" encouraging the parties to continue preparing for its remedial mapdrawing on a "voluntary" basis. J.S. App. 436a.

than for the federal court to devise and order into effect its own plan." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (principal op.). The district court's August 24, 2017 order therefore has the practical effect of an injunction blocking Plan H358.

The order satisfies all other aspects of appealability analysis. It "affect[s] predominantly all of the merits," *Salazar*, 671 F.3d at 1262, and alters the status quo, *see Calderon v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 137 F.3d 1420, 1422 n.2 (9th Cir. 1998); *Cohen v. Bd. of Trs. of the Univ. of Med. & Dentistry of N.J.*, 867 F.2d 1455, 1466 (3d Cir. 1989) (en banc). It is certain to have a "serious, perhaps irreparable, consequence," *Carson*, 450 U.S. at 84, because it invalidates multiple districts and compels the State to redraw the Texas House map. And the order can be "'effectually challenged' only by immediate appeal," *id.*, because appellate review from a final judgment after the imposition of remedial maps would come too late to prevent the irreparable harm of being forced to use a new court-ordered map for the 2018 elections. The practical effect of the district court's order therefore establishes this Court's jurisdiction.

II. All Claims Against Districts in Plan H283 That Were Imposed by the District Court in 2012 Are Meritless.

A. The 2013 Legislature Could Not Possibly Have Acted with an Unlawful Purpose When It Adopted Districts Ordered by the District Court.

The district court invalidated Texas' House map on the theory that the Legislature engaged in intentional

discrimination when it enacted as its own a redistricting plan nearly identical to the one that the district court itself ordered the State to use in 2012. Adopting the flawed purpose reasoning from its Order on the 2013 congressional map, Plan C235, the court concluded that the Legislature failed to remove the "taint" of discrimination that supposedly lingered from the 2011 plan that the district court's remedial plan replaced—even though that is precisely what the 2012 remedial plan was supposed to accomplish under this Court's mandate in *Perry v. Perez*. That extraordinary holding, which expressly incorporated the purpose analysis from its Order on Plan C235, J.S. App. 6a ("This Court's analysis in the Order on Plan C235 concerning the intent of the 2013 Legislature applied to both Plan C235 and Plan H358."), is just as wrong regarding the Texas House map as it was regarding the State's congressional map. *See* Jurisdictional Statement at 15-29, *Abbott v. Perez*, No. 17-586 (Oct. 17, 2017) (explaining the grave flaws in the district court's purpose analysis regarding Plan C235).

In holding that the Texas Legislature acted for race-based reasons when it enacted Plan H358, the district court's order ignored "the presumption of good faith that must be accorded legislative enactments," *Miller v. Johnson*, 515 U.S. 900, 916 (1995), as well as its duty to "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race," *id.* The presumption of good faith accorded to legislative enactments means that plaintiffs bear the burden of untangling permissible and impermissible motivation, and

any doubt must be resolved in favor of the Legislature. *Id.* The presumption carries particular weight in the context of redistricting legislation because "reapportionment is primarily the duty and responsibility of the State," *Chapman v. Meier*, 420 U.S. 1, 27 (1975), and "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," *Miller*, 515 U.S. at 915.

Contrary to those well-established principles, the district court applied a presumption of *invalidity* and resolved every doubt against the Legislature. The court's extraordinary decision reasoned that Plan H358 was infected with "taint" that the Legislature was required to (but failed to) cure—even though H358 largely mirrored the remedial plan imposed by the district court itself. *See, e.g.*, J.S. App. 357a (Order on Plan C235) (faulting the State for failing to "cleanse the plans of continuing discriminatory intent or legal defect"); *id.* at 6a (incorporating the purpose reasoning from its Order on Plan C235). Indeed, all but one of the districts with which the district court took issue were identical to the districts the court itself ordered the State to use in its 2012 elections.

The notion that the Legislature engaged in intentional discrimination by adopting the court's own remedial map makes neither legal nor practical sense. When the Legislature embraced that remedial map as its own, it did so out of a desire to comply with the Constitution and the VRA and bring an end to this litigation. The Legislature had the benefit of judicial guidance unavailable in 2011—namely, the district court's own 2012 opinion

finding that Texas House districts in Bell County, Dallas County, Nueces County, and Tarrant County did not contain "plausible legal defects." *See id.* at 313a. The Legislature also had a keen sense of the costs of continuing litigation and a seemingly obvious mechanism to ensure that future elections to the Texas House of Representatives would be conducted under lawful districts.

Rather than continuing the litigation over the 2011 map, the Legislature accepted the court-ordered Plan H309 as to the lines that changed and, except for a handful of districts, as to the lines that the court did not find a basis to change. That action, particularly when viewed through the lens of the presumption of good faith and validity, cannot be understood as anything other than a good-faith effort to adopt a districting map that complied with all governing law.

B. Plan H358 Never Was Infected By Any Discriminatory "Taint."

As explained in the previous section, the 2013 Legislature could not possibly have had an unlawful purpose in adopting districts imposed by the district court itself, in a map drawn under an order from this Court to remedy any potential constitutional and VRA violations. In all events, there was nothing unlawful about these districts to begin with, and thus no lingering "taint" from the 2011 Legislature's map for the 2013 Legislature to "cure."

1. The District Court's Finding of a Discriminatory "Taint" Is Grounded in an Impermissible Advisory Opinion.

At the outset, like its order on the State's congressional plan, the district court's order invalidating Plan H358 depends on its previous adjudication of moot claims against a 2011 plan that never took legal effect. For the same reasons it never should have decided the moot claims against the repealed congressional plan, the district court should have dismissed all claims against the never-implemented Plan H283 as soon as it was repealed. *See* Jurisdictional Statement, *Abbott v. Perez*, No. 17-586, at 25-28 (Oct. 17, 2017) (explaining the absence of jurisdiction to rule on the repealed 2011 congressional plan). But even setting aside its impermissible issuance and subsequent reliance on an advisory opinion, the district court had no legal or factual basis to find that the 2011 Legislature engaged in intentional vote dilution in need of "curing" in Bell County, Dallas County, or Nueces County—as explained below.

2. There Is Not and Never Has Been Vote Dilution in Bell County.

a. Intentional vote dilution requires proof of both vote-dilutive effect and discriminatory intent. *Shaw v. Reno*, 509 U.S. 630, 641 (1993). And vote-dilutive effects exist only when plaintiffs have proven that additional compact minority opportunity districts could have been drawn. *E.g.*, *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009) (plurality op.). The district court never made such

a finding in Bell County, nor could it. J.S. App. 18a ("The Court found no § 2 results violation in Plan H283 . . . .").

The district court did not hold that VRA §2 required the Legislature to draw a coalition district in Bell County combining African-American and Hispanic voters.[5] *Id.* at 20a-21a (declining to address the question of voting cohesion between Hispanic and African-American voters in Bell County). Because the population was not sufficiently numerous to draw an African-American- or Hispanic-majority district in the county, this amounted to a holding that VRA §2 did not require the Legislature to draw *any* minority opportunity district in Bell County. The district court therefore had no basis to find a vote-dilutive effect in Bell County and thus no basis to find intentional vote dilution.

b. Unsurprisingly, given that there was no vote-dilutive effect to begin with, the district court also had no basis to find any discriminatory intent. *Id.* at 18a ("[C]onsidering all the evidence, the Legislature's intentional failure to create the proposed districts was not intentional vote dilution."). The 2011 Legislature plainly drew the two districts in Bell County—HD54 and HD55—with incumbency and "partisan advantage," not race, in mind. *See* J.S. App. 278a (Smith, J., dissenting). Due to population growth, HD54 could no longer include both Burnet

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[5] Regardless, this Court already concluded—in this case—that there is "no basis" in law to require any coalition district even if there is racially-polarized voting and the coalition satisfies all *Gingles* requirements. *Perez*, 565 U.S. at 397; *see Bartlett*, 556 U.S. at 15 ("Nothing in § 2 grants special protection to a minority group's right to form political coalitions.").

County and Lampasas County. The incumbent, Representative Aycock, drew HD54 with the undisputed goals of maintaining his relationship with Lampasas County and favoring his reelection. *Id.* at 182a-183a. This Court has made clear that drawing lines for partisan advantage is a race-neutral explanation for district lines, "even if it so happens that the most loyal Democrats happen to be [minorities] and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999). The Legislature's undisputed and race-neutral goals of seeking partisan advantage, protecting the incumbent, and maintaining the incumbent-constituent relationship thus should have precluded any finding of intentional race-based discrimination.

The district court acknowledged, as it had to, that HD54 was drawn to ensure "Republican voting strength," J.S. App. 22a, but it imagined race-based discrimination because a small portion of the City of Killeen, which happened to include some minority voters, was moved to HD55. *Id.* at 21a-22a ("[T]he minority population was intentionally split to ensure Anglo Republican voting strength . . . ."). There is no evidence to support the conclusion that Representative Aycock, let alone the Legislature as a whole, divided the City of Killeen for the specific purpose of harming minority voters. Dividing Killeen in any way would incidentally affect some minority voters because Killeen has a very diverse and integrated population. *Id.* at 15a. But mere knowledge that district lines would exclude some minority voters does not amount to intentional racial discrimination, *Pers.*

Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences."), particularly when the Legislature is entitled to a presumption of good faith, when any decision to divide Killeen could have been challenged on the same grounds, and when the lines were drawn with an undisputed race-neutral purpose to protect an incumbent.

c. The district court also incorrectly suggested that Bell County's House districts must be redrawn to "equaliz[e] population variances . . . previously found to violate one person, one vote principles." J.S. App. 20a. This referenced the district court's advisory finding (in April 2017) that the 2011 Legislature engaged in invidious vote dilution under the one-person, one-vote doctrine because it failed to justify a minor 3.32% population deviation between HD54 and HD55. *Id.* at 269a. That finding has no basis in this Court's one-person, one-vote doctrine or the record in this case, and it cannot be attributed to the 2013 Legislature in any event.

This Court has instructed that, as a general rule, "a maximum population deviation under 10%" constitutes a "minor" deviation that is "insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." *Brown v. Thomson*, 462 U.S. 835, 842 (1983). To be sure, a plan with a deviation below 10% may be challenged, but "attacks on deviations under 10% will succeed only rarely, in unusual cases." *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1307 (2016). To succeed, "those attacking a state-approved plan must show that it is more probable than not that a

deviation of less than 10% reflects the predominance of illegitimate reapportionment factors." *Id.* In short, it is the plaintiff's burden to prove that illegitimate motives predominated; it is not the State's burden to prove that minor deviations reflect permissible motives.

The district court plainly violated *Harris* by shifting the burden of proof to the State. It announced that "deviations may exist, but they must be justified by the right reasons." J.S. App. 241a. It set out to "analyze whether the population deviations in Plan H283 are explained by legitimate legislative policies in ways that justify the challenged deviations." *Id.* at 199a. And it faulted the State because "population deviations were intentionally not minimized beyond 10%, and were not explained or justified on the legislative record during the session." *Id.* at 238a. In the district court's erroneous view, the existence of "unexplained" or "unjustified" deviations was enough to make out a prima facie case of invidious discrimination. That turns one-person, one-vote doctrine on its head.

The district court also made a clearly erroneous finding of fact when it concluded that the deviation in Bell County "resulted from the predominance of the illegitimate use of race to ensure that both districts remained Republican." *Id.* at 271a. There is no question that HD54 was drawn to include Republican voters. But at most, that shows that the district was drawn to protect an incumbent on the basis of partisan affiliation, which correlated with race. *See Bush v. Vera*, 517 U.S. 952, 968 (1996) (O'Connor, J., principal op.) ("If district lines merely correlate with race because they are drawn on the basis of

political affiliation, which correlates with race, there is no racial classification to justify . . . ."), *cited in Easley v. Cromartie*, 532 U.S. 234, 243 (2001). There is no evidence that "the minority population was intentionally split," J.S. App. 21a, let alone that race predominated.

This is exactly the opposite of an unusual case where a minor deviation shows invidious intent—particularly when the district court itself imposed these districts in 2012. Even if there were some question about the Legislature's motivation in 2011, there is no basis to impugn the Legislature's motivation in 2013, when it adopted the Bell County House districts unchanged from the court-ordered remedial plan.

3. There Is Not and Never Has Been Vote Dilution in Dallas County.

The district court's finding that the 2011 Legislature engaged in intentional vote dilution in three west Dallas County districts—HD103, HD104, and HD105—also fails because there was no vote-dilutive effect. The district court conceded that it was not possible to create additional compact minority opportunity districts in Dallas County. J.S. App. 22a. And the district court also concluded that VRA §2 did not require coalition districts in Dallas County, given that the plaintiffs failed to prove cohesion between African-American and Hispanic voters. *Id.* at 27a. Yet notwithstanding its own finding that there was no vote-dilutive effect, the district court nonetheless found the State liable for intentional vote dilution. That theory of liability—for intentional discrimination that has no discriminatory effect—has no basis in this Court's vote-dilution precedents. *See, e.g., Palmer v.*

Thompson, 403 U.S. 217, 224 (1971) ("motivations" alone cannot "violate equal protection"); *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (recognizing a VRA §2 claim based on vote-dilutive effect).

4. There Is Not and Never Has Been Vote Dilution in Nueces County.

a. Finally, the 2011 Legislature could not have engaged in intentional vote dilution in Nueces County because, once again, there was no discriminatory purpose and no vote-dilutive effect. Under the plan that existed in 2010, Nueces County contained two Texas House Districts (HD33 and HD34) and part of a third (HD32), but a relative decline in population entitled the county to only two Texas House districts based on the 2010 Census. *See* J.S. App. 26a. It was therefore not possible to keep the previous configuration in light of the existing population. Consequently, as required by the Texas Constitution's whole-county provision,[6] the 2011 Legislature apportioned two Texas House districts to Nueces County (HD32 and HD34). *See id.* at 27a. One of those two districts was drawn as a Hispanic opportunity district. *Id.* at 57a. That ensured roughly proportional representation: Nueces County Hispanic voters "are around 56% of the relevant population (CVAP)." *Id.* at 51a.

The district court found both intentional vote dilution and vote-dilutive effects in Nueces County, faulting the State for not drawing "an additional compact minority

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[6] The Texas Constitution requires Texas House districts to be drawn within county lines if possible. TEX. CONST. art. III, sec. 26.

district," *id.* at 54a—that is, "two HCVAP-majority districts wholly within Nueces County," *id.* at 59a. Both the purpose- and effect-based holdings were clearly wrong. As the district court itself recognized, it was not possible to draw two performing minority opportunity districts in Nueces County. *See id.* ("Nueces County had two minority opportunity districts, but they could not be maintained in their benchmark configurations due to population loss."). In fact, the plaintiffs' own attempt to draw two Hispanic opportunity districts within the county resulted in levels of performance for Hispanic-preferred candidates that were "so low as to indicate a lack of real electoral opportunity in both districts." *Id.* at 44a. And the district court rejected the plaintiffs' claim that VRA §2 required the Legislature to violate the whole-county provision in order to create an additional Hispanic opportunity district. *Id.* at 49a-50a, 59a ("[B]reaking the County Line Rule twice to remove Anglos and incorporate even more Hispanics to improve electoral outcomes goes beyond what § 2 requires.").

Moreover, the district court recognized that "[c]reating a second district would result in over-representation [of Hispanic voters] in Nueces County." *Id.* at 51a. And it expressly found that "Hispanics are being elected to countywide offices and as house district representatives, indicating a lack of barriers to candidacy and election." *Id.* at 55a. The evidence—and the district court's own findings—thus demonstrate that the configuration of Nueces County House districts does *not* dilute Hispanic voting strength. The district court therefore erred by finding, contrary to the evidence, that the configuration

of HD32 and HD34 caused a vote-dilutive effect in Nueces County.

b. The district court also erred when it relied on its previous advisory finding of invidious vote dilution based on a one-person, one-vote violation—a finding made in 2017, but not in its 2012 remedial order. The district court found a one-person, one-vote violation in Nueces County because the Legislature failed to justify a minor 3.63% deviation between HD32 (0.34% below the statewide ideal) and HD34 (3.29% above the statewide ideal). *Id.* at 254a. But the district court cited no authority for finding a one-person, one-vote violation based on the deviation between two districts, as opposed to the maximum deviation in a statewide plan. Nor did the district court cite any authority for shifting the burden of proof to the State to justify a deviation of less than 4%.

The district court's anomalous holding betrays a drastic misunderstanding of this Court's one-person, one-vote doctrine. As explained above, *see supra* pp. 25-26, "attacks on deviations under 10% will succeed only rarely, in unusual cases," *Harris*, 136 S. Ct. at 1307, and the burden lies with the plaintiff to prove that illegitimate motivations predominated.

Relying on one such unusual case, *Larios v. Cox*, the district court faulted the Legislature for assuming that deviations below 10% did not require justification. It stressed that under *Larios*, "deviations of less than 10% are not within a safe harbor," J.S. App. 216a. But the question is not whether the 10% threshold provides a "safe harbor," even if the Legislature thought it did. The question is whether the plaintiffs proved that the plan's

minor deviation resulted predominantly from illegitimate considerations.

The district court answered *that* question in the negative, which should have been the end of the plaintiffs' claims. The court acknowledged that this case is nothing like *Larios* (which involved a 9.98% maximum deviation, 300 F. Supp. 2d at 1326), and it expressly rejected the plaintiffs' claim that the 2011 plan's maximum deviation violated the one-person, one-vote principle. J.S. App. 272a ("Plaintiffs' statewide *Larios* challenge to Plan H283 fails."). Specifically, it found that the 2011 Legislature did *not* manipulate population deviations to systematically disadvantage minority voters or Democratic incumbents. *Id.* at 249a-250a, 272a; *cf. Larios*, 300 F. Supp. 2d at 1329 (finding that the Democratic majority in the Georgia Legislature used population deviations to target Republicans, "primarily by systematically underpopulating the districts held by incumbent Democrats, by overpopulating those of Republicans, and by deliberately pairing numerous Republican incumbents against one another"). The State's supposed reliance on a 10% "safe harbor" was therefore inconsequential; the district court held that the 2011 plan's statewide deviation, just below 10%, did not violate one-person, one vote. That is undoubtedly correct.

But the district court erred because it asked the wrong question. In an unprecedented application of one-person, one-vote doctrine, it shifted its focus from the statewide plan to scrutinize minor population deviations between individual districts. Relying on *Brown v. Thomson*, the district court concluded that "the geographic

scope of a one person, one vote claim . . . is whatever the plaintiff makes it." J.S. App. 224a. But *Brown v. Thomson* does not stand for the proposition that plaintiffs may base one-person, one-vote claims on de minimis deviations in discrete geographic areas. In *Brown*, the Court declined to address the constitutionality of a statewide deviation because the plaintiffs only challenged the application of state policy in a single district. 462 U.S. at 846. But that single district was more than 60% below the ideal district population, *id.* at 843-46, which was enough to make out a prima facie case against the entire plan. *Brown* therefore does not support the district court's radical conclusion that States must justify any deviation in any district, no matter how small.

The district court nevertheless found a one-person, one-vote violation in Nueces County because the Legislature failed to justify a deviation of less than 4%. It found that "mapdrawers could have faithfully applied the County Line Rule *and* drawn two districts . . . with roughly equal population." J.S. App. 254a. But because they did not, the court found that the Legislature "intentionally overpopulated HD34 and underpopulated HD32 without legitimate justification in violation of one-person, one-vote principles." *Id.* at 30a. That conclusion is legally erroneous, and it ignores the wider latitude this Court's one-person, one-vote precedents give to population deviations in state legislative (as opposed to congressional) maps. *E.g.*, *Brown*, 462 U.S. at 842.

The district court also assumed, without justification, that a total-population disparity necessarily dilutes voting strength. *See* J.S. App. 225a ("By their very nature,

a plan with population deviations will overvalue voters in underpopulated districts and undervalue voters in overpopulated districts."). This is not necessarily so. In *Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004) (per curiam), *aff'd*, 543 U.S. 997 (2004) (mem.), which this Court summarily affirmed after *Larios*, the district court rejected a one-person, one-vote claim, despite a pattern of overpopulating "downstate" districts, because those districts were actually systematically *underpopulated* in terms of eligible voters. *Id.* at 369. Here, the district court did not consider whether the disparity in total population caused a disparity in the population of eligible voters or, if it did, which way that disparity cut.

Finally, the district court clearly erred when it assumed that the Legislature must have relied on racial data merely because "HD34 is significantly more Hispanic in population and significantly more overpopulated than HD32." J.S. App. 255a. Relying on "this evidence of the use of race"—which is no evidence at all—it concluded that the Legislature intentionally "dr[ew] the lines in Nueces County to overpopulate the minority district while underpopulating the Anglo district." *Id.* That finding has no support in the record.

III. The District Court's Finding of Improper Race-Based Decisionmaking in HD90 Contravenes This Court's Precedents.

Unlike the other districts invalidated by the district court, HD90 was actually changed by the Legislature in 2013 compared to the 2012 court-ordered map. But the district court's finding of liability in HD90 perfectly illustrates the dilemma that state legislatures face when they

attempt to balance the competing demands of VRA §2 and the Fourteenth Amendment. It also demonstrates the impossibility of avoiding liability under the district court's remove-the-taint theory of intentional discrimination. Under the standards imposed by the district court, the Texas Legislature faced a no-win situation.

The district court found that the 2013 Legislature engaged in racial gerrymandering in HD90 because it relied predominantly on race to maintain Hispanic voting population levels in the district. But even if race had been the predominant motive for the 2013 Legislature's drawing of HD90, the Legislature had the strongest possible reasons to believe that consideration of race was necessary to avoid a VRA §2 violation. The Mexican American Legislative Caucus—a plaintiff in this litigation—expressed a specific concern about reducing the district's Spanish-surnamed voter registration below 50%. J.S. App. 72a. The Legislature responded by configuring the district to ensure that the district's Spanish-surnamed voter registration did not drop below 50%. *Id.* at 75a. Despite that effort to maintain HD90 as a Hispanic opportunity district, another group of plaintiffs *still sued* the State claiming that VRA §2 required the Legislature to add even *more* Hispanic voters to the district. *Id.* at 69a.

In finding that the State's clear effort to avoid a VRA §2 problem did not suffice to justify the use of race, the district court reasoned that "avoid[ing] a potential VRA problem" is just "a vague goal" and "is not a strong basis in evidence that the VRA requires such use of race." *Id.* at 81a. That conclusion is impossible to reconcile with this Court's decisions in *Cooper* and *Bethune-Hill*, and it

is truly extraordinary on these facts. Not only had one plaintiff argued during the legislative process that reducing the Hispanic registered-voter population below 50% in HD90 would result in vote dilution, a different plaintiff *actually brought a claim of vote dilution* despite the Legislature's efforts to maintain that population. Short of a court order that the VRA required a particular district, it is difficult to imagine a stronger basis for a Legislature to believe that it must consider race to avoid liability under the VRA.

The district court's heads-plaintiffs-win, tails-State-loses ruling creates the very situation that this Court's precedents seek to avoid. *See Cooper*, 137 S. Ct. at 1464 (quoting *Bethune-Hill*, 137 S. Ct. at 802) (The "'strong basis' (or 'good reasons') standard gives States 'breathing room' to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed."). The district court's flawed standard puts the State to an impossible choice—violate the Constitution or violate the VRA—leaving no breathing room at all.

If that were not enough, the district court's analysis of HD90 created a second lose-lose situation for the Legislature. Although the 2013 Legislature reconfigured HD90, the district court concluded that it did not sufficiently remove the "taint" of intentional discrimination by the 2011 Legislature. J.S. App. 83a, 85a ("In Tarrant County, the intentional discrimination previously found by the Court must be remedied, affecting HD90 and HD93."). It reached this conclusion notwithstanding its own finding that the intentional-vote-dilution claim

against the district, as reconfigured in 2013, "fails because of a lack of discriminatory intent." *Id.* at 84a.

In short, the 2013 Legislature substantially redrew HD90; the district court determined that it did not intentionally discriminate; and yet the court still held that the Legislature failed to "remedy" the purported discriminatory intent of the 2011 Legislature. That holding underscores that in the district court's opinion, *absolutely nothing* that the 2013 Legislature did could have cleansed the supposed discriminatory "taint" from the repealed, never-precleared, and never-in-effect maps drawn by the 2011 Legislature. That is not and cannot be the law. Legislatures simply are not required to "cleanse" past reenactments of discriminatory *intent*, and they are certainly not required to scour *court-ordered* remedial maps for the very "taint" that the court itself was under a mandate to eliminate.

CONCLUSION

The Court should note probable jurisdiction or in the alternative summarily reverse.

Respectfully submitted.

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